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Sliding Down the Slippery Slope of the Sixth Amendment: Arguments for Interpreting *Padilla v. Kentucky* Narrowly and Limiting the Burden It Places on the Criminal Justice System

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Sliding Down the Slippery Slope of the Sixth Amendment

ARGUMENTS FOR INTERPRETING *PADILLA V. KENTUCKY* NARROWLY AND LIMITING THE BURDEN IT PLACES ON THE CRIMINAL JUSTICE SYSTEM

INTRODUCTION

On October 4, 2002, a Kentucky state court entered final judgment against Jose Padilla for certain charges related to the transport of marijuana.[1] Almost eight years later, that commonplace occurrence[2] resulted in the Supreme Court of the United States reevaluating the Sixth Amendment rights afforded to criminal defendants under the United States Constitution.[3]

The state court entered judgment against Mr. Padilla after he pleaded guilty to "trafficking in more than five pounds of marijuana, possession of marijuana, [and] possession of drug paraphernalia."[4] Two years later, on August 18, 2004, Mr. Padilla filed for postconviction relief, claiming that his attorney had provided him with ineffective counsel by failing to advise him of the possible removal consequences of entering a guilty plea.[5] According to Mr. Padilla, his attorney had been aware of

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[1] Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd and remanded sub nom.* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

[2] In 2001 the Kentucky State Police made 6755 marijuana-related arrests. *Crime in Kentucky-2001*, KY. ST. POLICE, http://www.kentuckystatepolice.org/pdf/crimefacts2001.pdf (last visited Sept. 30, 2011). In 2002 that number rose to 13,472. *Crime in Kentucky-2002*, KY. ST. POLICE, http://www.kentuckystatepolice.org/pdf/crimefacts2002.pdf (last visited Sept. 30, 2011).

[3] *See Padilla*, 130 S. Ct. 1473.

[4] *Padilla*, 253 S.W.3d at 483. In exchange for his plea, the fourth and related charge of "operating a tractor/trailer without a weight and distance tax number" pending against Mr. Padilla was dismissed, and he was promised a ten-year sentence, only five years of which were to be served. *Id.*

[5] *Id.* The drug trafficking offense that Mr. Padilla was charged with is deportable under 8 U.S.C. § 1227(a)(2)(B)(i) (2006) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

his status as a noncitizen, and had incorrectly advised him that he "did not have to worry about immigration status since he had been in the country so long."[6]

Mr. Padilla's motion for postconviction relief was denied.[7] After a series of appeals and reversals,[8] the Supreme Court of Kentucky ultimately found that because deportation is a collateral consequence of a criminal conviction, a claim of ineffective assistance of counsel is inapplicable where the petitioner complains either of a failure to advise or of the administration of incorrect advice regarding deportation.[9] In 2009, the Supreme Court of the United States granted certiorari on the matter.[10]

In *Padilla v. Kentucky*, the Supreme Court ultimately held that the two-prong *Strickland v. Washington*[11] test for determining ineffective assistance of counsel did apply to Mr. Padilla's claim,[12] and that under the Sixth Amendment, defense "counsel must inform her client whether his plea carries a risk of deportation."[13] In finding that advice regarding the potential immigration consequences of a guilty plea is the type of information to which a defendant is entitled under the Sixth Amendment's right to counsel,[14] the Court rejected the idea that removal could be easily defined as "either a direct or a collateral consequence" of a criminal conviction.[15] In order to fully appreciate the potential future impact of the Court's ruling on the criminal justice system, it is prudent to first understand the jurisprudence regarding ineffective assistance of counsel and the doctrine of collateral consequences.

Part I of this note will describe the state of the law regarding ineffective assistance of counsel and collateral consequences of criminal conviction prior to *Padilla*. Part II

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[6] *Padilla*, 253 S.W.3d at 483. Mr. Padilla was born in Honduras, but at the time of the Supreme Court's ruling he had lived in the United States for over forty years as a legal permanent resident. *Padilla*, 130 S. Ct. at 1477.

[7] *Padilla*, 253 S.W.3d at 483.

[8] The court of appeals reversed the trial court's denial of Mr. Padilla's motion and remanded the case for a hearing on the ineffective assistance of counsel claim. The Commonwealth of Kentucky then appealed that decision. *Id.* at 483-84.

[9] *Id.* at 485.

[10] *Padilla*, 130 S. Ct. at 1478.

[11] 466 U.S. 668 (1984); *see* discussion *infra* Part I.A.

[12] *Padilla*, 130 S. Ct. at 1482.

[13] *Id.* at 1486.

[14] In pertinent part, the Sixth Amendment reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

[15] *Padilla*, 130 S. Ct. at 1482.

will analyze the *Padilla* decision and demonstrate how the opinion opened the door for a slew of ineffective assistance of counsel claims on many issues that had previously been deemed collateral to criminal conviction. Part III will examine how post-*Padilla* cases have interpreted the holding of the case in relation to specific issues. This section will argue that some lower courts have interpreted the decision too expansively and in ways that will negatively affect the criminal justice system and make the work of criminal defense attorneys much more challenging. Finally, Part IV will discuss what criminal defense attorneys can expect in a post-*Padilla* world and the steps they should take in order to avoid claims of ineffective assistance of counsel. Additionally, this section will ultimately advocate the following positions: *Padilla* should not be applied retroactively; the distinction between clear and unclear immigration law should play a greater role in post-*Padilla* ineffective assistance of counsel claims; it is the courts that should ensure that defendants accepting guilty pleas have been advised of possible removal consequences; defense counsel should be able to put her client in contact with an immigration specialist in lieu of providing immigration advice herself; and *Padilla* should be read narrowly and should not be expanded to encompass other consequences that have previously been understood as collateral to criminal conviction.

I. THE BACKGROUND OF THE LAW BEFORE *PADILLA*

As *Padilla* is best understood in the context of the doctrines of ineffective assistance of counsel and collateral consequences of criminal conviction, it is necessary to explore those doctrines before analyzing the opinion and its future implications.

A. Ineffective Assistance of Counsel

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence"[16] is interpreted by the Supreme Court as a guarantee of "'the right to the *effective* assistance of counsel.'"[17] The leading case discussing the standards under which a defendant can successfully bring a

[16] U.S. CONST. amend. VI.

[17] Strickland v. Washington, 466 U.S. 668, 686 (1984) (emphasis added) (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

claim for ineffective assistance of counsel is *Strickland v. Washington*.[18] The test set forth in *Strickland* has traditionally been a very difficult one to satisfy.[19] In *Strickland*, a defendant who had pleaded guilty to a series of violent crimes, including capital murder, petitioned the Florida state court to have his conviction and death sentence overturned on the basis that his attorney had provided ineffective assistance.[20] The defendant asserted that his counsel was ineffective in that he "failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts."[21] The requested relief was denied to the defendant at both the trial and appellate levels.[22]

Defendant Strickland subsequently filed for a writ of habeas corpus in federal court, again requesting relief on the basis of ineffective assistance of counsel.[23] His request was denied for the last time under the two-part test set forth by the Court for the determination of claims of ineffective assistance of counsel.[24] The Court held that in order to make out a claim of ineffective assistance of counsel, a defendant must first show "that counsel's representation fell below an objective standard of reasonableness."[25] If the defendant can meet that standard, he must then show that his attorney's errors prejudiced him, meaning that the actions, or inactions, "actually had an adverse effect on the defense."[26]

Throughout the *Strickland* opinion, the Court indicated that the standard it articulated would be difficult for a defendant to meet. For example, the Court stated,

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[18] *See id.* at 668; LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 284 (Aspen Publishers 2d ed. 2008).

[19] *Padilla*, 130 S. Ct. at 1485 ("Surmounting *Strickland*'s high bar is never an easy task." (citing *Strickland*, 466 U.S. at 689, 693)); Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 427 (1988) ("*Strickland*[] . . . creates an almost insurmountable hurdle for defendants claiming ineffective assistance [of counsel].").

[20] *Strickland*, 466 U.S. at 671.

[21] *Id.* at 675.

[22] *Id.* at 676-78.

[23] *Id.* at 678.

[24] *See id.* at 700-01.

[25] *Id.* at 688.

[26] *Id.* at 693.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.[27]

Additionally, the Court remarked that "court[s] should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[28] Furthermore, even if a defendant can satisfy the first prong of the *Strickland* test by demonstrating that his attorney was in error, he must then show that such error in fact prejudiced him.[29] This task seems trying, for "[a]ttorney errors . . . are as likely to be utterly harmless . . . as they are to be prejudicial," and "an act or omission that is unprofessional in one case may be sound or even brilliant in another."[30] And indeed, in the more than twenty-five years since *Strickland* was decided, it has been very difficult for a defendant to make a showing sufficient for a court to rule in his favor on the claim of ineffective assistance of counsel.[31]

A year after its *Strickland* opinion, the Court extended the application of the *Strickland* test, which was formulated in the context of a capital sentencing proceeding, to include the evaluation of ineffective assistance of counsel challenges to guilty pleas.[32] In *Hill v. Lockhart*, the Court explained that as it applies to guilty pleas, the first prong of the *Strickland* test "is nothing more than a restatement of the standard of attorney competence already set forth" in previous cases.[33] This standard was set forth in *McMann v. Richardson*, where the Court stated that the validity of a guilty plea "depends . . . on whether [counsel's] advice was within the range of competence demanded of attorneys in criminal cases."[34] What falls within this range "should be left to the good sense and discretion of the trial [judges]," whose responsibility it is to "maintain

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[27] *Id.* at 689.
[28] *Id.* at 690.
[29] *Id.* at 693.
[30] *Id.*
[31] *See, e.g.*, LERMAN & SCHRAG, *supra* note 18, at 284 ("[I]t is unlikely that a defendant can win an ineffective assistance appeal unless his lawyer's performance was really awful.").
[32] Hill v. Lockhart, 474 U.S. 52, 57-58 (1985).
[33] *Id.* at 58-59.
[34] McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

proper standards of performance by attorneys."[35] In merely restating this reasonableness standard, *Strickland* does nothing to clarify it, and actively rejects the idea that stringent guidelines should be set dictating the conduct of defense counsel.[36] Because there are no clear rules for what does and does not pass the bar, it has traditionally been very hard for a defendant to prove that his attorney's conduct was so lacking as to violate the first prong of the *Strickland* test.[37] Notably, in more recent cases, the Court appears to have "taken a more robust approach to the performance prong of the *Strickland* test."[38]

Even if a defendant can prove that his counsel's advice regarding his guilty plea was so poor as to fall below this first prong standard of competence, he must then go on to meet the second prong of the *Strickland* test.[39] As it applies to guilty pleas, this "prejudice" prong of the test requires the defendant to demonstrate "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have

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[35] *Id.* at 771.

[36] *See* Strickland v. Washington, 466 U.S. 668, 688-89 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." (citation omitted)).

[37] Calhoun, *supra* note 19, at 428 ("By adopting the amorphous 'reasonable attorney' standard and adding language about the wide range of effective assistance and the strong presumption favoring attorney competence, the Court has given lower courts the power—without giving them adequate guidance—to interpret the all-important right to effective assistance of counsel on an ad hoc basis in a climate often hostile to defendants.").

[38] Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 394 (2009); *see also* Rompilla v. Beard, 545 U.S. 374, 387 (2005) (holding that under the *1982 ABA Standards for Criminal Justice*, defense counsel did not make the requisite reasonable efforts to examine the file regarding defendant's prior conviction); Wiggins v. Smith, 539 U.S. 510, 524 (2003) (holding that under the *1989 ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, defense counsel did not sufficiently investigate for mitigating evidence); Williams v. Taylor, 529 U.S. 362, 396 (2000) (holding that under the *1980 ABA Standards for Criminal Justice*, defense counsel had failed to conduct a proper investigation into the defendant's past).

It may be important to note that *Rompilla v. Beard*, *Wiggins v. Smith*, and *Williams v. Taylor* are all death penalty cases. It is possible that the Court only felt the need to give the first prong of the *Strickland* test more teeth in these instances because the defendants' lives were at stake. However, this still seems to denote a remarkable change in the Court's ideas regarding the ineffective assistance of counsel standard, as *Strickland* itself was a death penalty case. *See supra* note 20 and accompanying text.

[39] Hill v. Lockhart, 474 U.S. 52, 59 (1985). It is also noteworthy that in *Strickland*, 466 U.S. at 697, the Court announced that courts may consider the two prongs of the ineffective assistance of counsel test in whichever order is easier for them. If it is clear that the alleged action, or inaction, of counsel was of no prejudice to the defendant, the effectiveness of counsel's performance need never be ruled on. *Id.*

insisted on going to trial."[40] This requirement serves the "fundamental interest in the finality of guilty pleas."[41] Undermining finality is undesirable because it shakes "'confidence in the integrity of [court] procedures . . . and . . . inevitably delays and impairs the orderly administration of justice.'"[42] Because guilty pleas, not trials, produce most criminal convictions, the greatest negative impact on finality occurs when courts sanction new bases for vacating such pleas.[43] Additionally, courts should err on the side of finality when they consider challenges to guilty pleas, as these challenges do not often actually raise "'the concern that unfair procedures may have resulted in the conviction of an innocent defendant.'"[44]

When determining whether the defendant challenging his guilty plea has met this second prong, courts will often have to perform the same analysis that they would have had the conviction been arrived at after a trial, instead of through a plea of guilty.[45] The Supreme Court illustrated this point with the example of a defendant challenging his guilty plea on the grounds that his counsel failed to "investigate or discover potentially exculpatory evidence."[46] The Court explained that in this situation, the outcome of the second prong of the *Strickland* test will depend on the probability that "discovery of the evidence would have led counsel to change his recommendation as to the plea."[47] Furthermore, we are to assume that counsel would only have changed his recommendation if the discovered evidence would objectively have been likely to change the outcome of the case at trial.[48]

B. Collateral Consequences of Criminal Convictions

Another legal doctrine that was called into question by the Court's decision in *Padilla* is that of collateral consequences of criminal convictions. The Supreme Court has held that the validity of a guilty plea depends on "whether the plea represents a voluntary and intelligent choice among the

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[40] *Hill*, 474 U.S. at 59.
[41] *Id.* at 58 (citing United States v. Timmreck, 441 U.S. 780 (1979)).
[42] *Id.* (quoting *Timmreck*, 441 U.S. at 784).
[43] *Id.* (quoting *Timmreck*, 441 U.S. at 784).
[44] *See id.* (quoting *Timmreck*, 441 U.S. at 784).
[45] *Id.* at 59.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 59-60 (citing Strickland v. Washington, 466 U.S. 668, 695 (1984)).

alternative courses of action open to the defendant."[49] In *Brady v. United States*, the Court defined a voluntary guilty plea as one "'entered by [a defendant] fully aware of the direct consequences.'"[50] However, because *Brady* was not primarily concerned with the possible consequences of conviction, the Court did not elaborate on the meaning of "direct consequences."[51] Direct consequences are currently defined as those that have a "definite, immediate and largely automatic effect on the range of the defendant's punishment"[52] and include sanctions such as "jail or prison time, probationary period or a fine."[53] From the vague *Brady* definition of direct consequences has evolved "the so-called 'collateral consequences' rule," which is a product of the lower state and federal courts, and states that "an individual's guilty plea is constitutionally valid even if that person was unaware of his conviction's 'collateral' consequences."[54] Consequences that at some time have been deemed collateral include "deportation, sex-offender registration, post-sentence involuntary civil commitment as a 'sexually violent predator,' the loss of voting rights, and the loss of housing and employment opportunities."[55]

Commentators critical of the collateral consequences rule note that certain consequences that have traditionally been deemed collateral, such as deportation, are now in fact the direct result of conviction.[56] For example, under the current law, when a noncitizen is convicted of a crime categorized as an aggravated felony, he will automatically and necessarily be removed from the country, as there are no provisions for judicial

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[49] North Carolina v. Alford, 400 U.S. 25, 31 (1970) (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220, 223 (1927)).

[50] Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on confession of error on other grounds*, 356 U.S. 26 (1958)).

[51] Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 685 (2008).

[52] Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124 n.15 (2009) (citing Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973)).

[53] *See id.* at 124-25.

[54] *Id.* at 124; *see also* Roberts, *supra* note 51, at 684-85.

[55] Roberts, *supra* note 52, at 124 (citing, e.g., Moore v. Hinton, 513 F.2d 781, 782-83 (5th Cir. 1975); Waddy v. David, 445 F.2d. 1, 3 (5th Cir. 1971); Doe v. Weld, 954 F. Supp. 425, 438 (D. Mass. 1996)).

[56] Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 47-48, 56-57 (2010); Maureen Sweeney, *Fact or Fiction: The Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 47 (2010).

discretion in this circumstance.[57] Additionally, whereas in the past immigration authorities were not necessarily notified when a noncitizen was convicted of a crime that could lead to deportation (and removal would therefore often take place years after conviction or not at all),[58] today there are systems in place that ensure swift transitions between criminal proceedings, immigration proceedings, and removal.[59] Furthermore, some criminal courts now engage in the practice of issuing removal orders independent of any immigration authorities.[60] When considering the ways in which deportation has become closely linked to criminal procedures and convictions, it becomes harder to dismiss it as a merely collateral consequence.

The idea that deportation is a collateral consequence has also been criticized on the basis that removal is often just as, or even more, serious than the direct consequences of a guilty plea.[61] For example, when one member of a nuclear family is removed, the rest of the family members must decide whether to accept that they must live without the deported person, or to leave their home, family, friends, and jobs, and move to another country where they may have never been before, may not speak the language, and may not have any of the opportunities they had been accustomed to.[62] Arguably, a noncitizen defendant faced with such circumstances would only plead guilty if he had no other choice.[63] Often, when a noncitizen does accept a guilty plea, he will agree to lengthier terms of incarceration or parole, which are recognized as direct consequences of criminal conviction, in exchange for a plea that will not result in removal.[64] This suggests that at least some noncitizen defendants consider removal to be a more serious consequence of a guilty plea than traditional punishments.[65] While this does not bear on how direct a consequence

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[57] Sweeney, *supra* note 56, at 70 (citing 8 U.S.C. § 1229b(a)(3) (2006)).

[58] *Id.* at 71 (citing Daley v. State, 487 A.2d 320, 322 (Md. Ct. Spec. App. 1985)).

[59] *Id.* (citing, e.g., *Oversight of the Department of Homeland Security: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Janet Napolitano, Sec'y of Homeland Sec.)).

[60] *Id.* at 76.

[61] *See* Cruz, *supra* note 56, at 62; Fernando Nuñez, *Are Immigration Consequences Really Collateral?*, 34 T. MARSHALL L. REV. 323, 323 (2009); Roberts, *supra* note 52, at 124-25; Sweeney, *supra* note 56, at 50.

[62] Sweeney, *supra* note 56, at 51.

[63] Nuñez, *supra* note 61, at 337.

[64] Sweeney, *supra* note 56, at 50 (citing telephone calls and e-mails exchanged with various federal public defenders).

[65] *Id.* (citing same).

deportation is,[66] it does demonstrate that immigration consequences are of the utmost importance to noncitizen defendants and that such defendants would benefit from receiving immigration advice before accepting a guilty plea.

II. THE OPINION OF THE SUPREME COURT IN *PADILLA V. KENTUCKY*

In *Padilla*, the Supreme Court examined the nexus between an ineffective assistance of counsel claim and the doctrine of collateral consequences as it pertains to deportation and held that the Sixth Amendment requires defense counsel to notify her client when his guilty plea may make him subject to deportation.[67] The Court analyzed Mr. Padilla's claim under the *Strickland* test, holding that counsel's performance was constitutionally deficient under the first prong of the test, as it fell below a standard of "'reasonableness under prevailing professional norms.'"[68] Although counsel in Mr. Padilla's case actually provided incorrect information, as opposed to no information, regarding the immigration consequences of his guilty plea,[69] the Court expressly rejected the idea of limiting its holding to "affirmative misadvice."[70] The Court did not rule on the second prong of the *Strickland* test, leaving the determination of prejudice for the Kentucky courts on remand.[71] In ruling on the

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[66] *See supra* note 52 and accompanying text.

[67] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010).

[68] *Id.* at 1482-83 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)); *see also* discussion *supra* Part I.A. (discussing the *Strickland* test).

[69] *See supra* note 6 and accompanying text.

[70] *Padilla*, 130 S. Ct. at 1484. The Court gives two reasons for expanding its holding to include omissions, instead of just misadvice. *Id.* First, limiting the holding would encourage counsel to withhold available information from clients "fac[ing] possible exile from this country and separation from their families." *Id.* The second reason the Court gives is that such a holding "would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available." *Id.* However, it is unclear why a limited holding would actually incentivize counsel to withhold available information from clients, unless of course she believed that information she possessed was likely to be incorrect. It may be more accurate to say that a limited holding would provide counsel no motivation to seek out immigration advice for clients taking guilty pleas.

[71] *Id.* at 1483-84. Although the Court ultimately did not rule on whether the defendant had satisfied the prejudice prong of the *Strickland* test, it may be interesting to consider whether knowledge of the correct information regarding the immigration consequences of Mr. Padilla's guilty plea would have changed counsel's recommendation. In order to determine this, under *Hill*, we should ask whether the fact that a guilty plea would result in Mr. Padilla's deportation would have changed the outcome of a trial. *See* Hill v. Lockhart, 474 U.S. 52, 59 (1985). It most likely would not have, as his immigration status was immaterial to the crimes of drug trafficking and operating a tractor-trailer without proper documentation. *See* Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd*

effectiveness of Padilla's counsel, the Court considered both the ways in which immigration laws have gradually become more oppressive in the United States (and how defense attorneys have supposedly adapted their practices to account for these laws) and the implications of deportation for noncitizen defendants.[72] But the Court overestimated how conscientious defense attorneys have been in providing immigration advice and thereby opened the door for a large number of ineffective counsel claims. Additionally, by refusing to draw a line between direct and collateral consequences, the Court invited ineffective counsel claims based on other consequences that have traditionally been considered collateral to criminal conviction.

A. The Court's Account of the History of Deportation in the United States and of the Current Performance Standards for Defense Counsel

The *Padilla* Court's decision appears to be based on the idea that immigration law has become too harsh in the United States and the false assumption that criminal defense attorneys have been modifying their practice to account for this development.[73] The Court traced the path of federal immigration laws over the last ninety years, noting that while the number of deportable offenses has grown considerably, the discretion awarded to judges as to deportation has conversely

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and remanded sub nom. Padilla v. Kentucky, 130 S. Ct. 1473 (2010). However, in *Hill*, the Court also implied that where there is some circumstance or situation which is very important to a particular defendant, the court should consider that knowledge regarding this issue may have affected his decision to plead guilty. *See Hill*, 474 U.S. at 60. As Mr. Padilla had been living in the United States for approximately forty years at the time of his guilty plea, *see supra* note 6, it seems fair to consider his immigration status a very important circumstance. And indeed, in his appeal to the Supreme Court, Mr. Padilla did allege that if he had been advised of the effects his guilty plea would have on his immigration status, he would have gone to trial. *Padilla*, 130 S. Ct. at 1478. Therefore, it seems plausible that if the Supreme Court had not wanted to send a strong message to criminal defense attorneys about their obligations to noncitizen defendants, it could have found a violation of the second prong of the *Strickland* test, and focused more on that in its opinion. Potentially, the Court could even have found that just as a court may dismiss an ineffective assistance of counsel claim solely based on a prejudice prong assessment, *see supra* note 39, a court may also *grant* such a claim based on a prejudice prong assessment. Such a holding would have recognized the fact that even though an attorney's conduct was not objectively unreasonable under professional norms at the time it took place, it may still have prejudiced the defendant. For an in-depth discussion of the interplay between *Padilla* and the prejudice prong of the *Strickland* test, see Jenny Roberts, *Proving Prejudice, Post-*Padilla, 54 HOW. L.J. 693 (2011).

[72] *Padilla*, 130 S. Ct. at 1478-83.

[73] *See id.* at 1478-80, 1482-83.

shrunk to a point where it is almost nonexistent.[74] It explained that the passing of the Immigration and Nationality Act of 1917 marked the first time that noncitizens could be deported based on offenses committed within the United States.[75] The Court noted that although this Act was quite an expansion in immigration law, it did still include a "critically important procedural protection to minimize the risk of unjust deportation."[76] The 1917 Act allowed the sentencing judge in a criminal proceeding to recommend that a convicted noncitizen be spared deportation.[77] This veto power of sorts was called a "judicial recommendation against deportation" (JRAD), and was "'consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation.'"[78] However, even though the number of deportable offenses continued to expand, the 1952 Immigration and Nationality Act eliminated the JRAD as it applied to narcotics offenses,[79] the 1990 Congress abolished it all together,[80] and the 1996 Congress stripped the Attorney General of the power "to grant discretionary relief from deportation."[81] As the Court views the law today, "if a noncitizen has committed a removable offense . . . his removal is practically inevitable."[82] According to the Court, because of these gradual changes to the United States' immigration laws, "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important," as "deportation is . . . sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[83]

The Court stated that in light of these stringent immigration laws, professional custom and practice has evolved to "support[] the view that counsel must advise her client regarding the risk of deportation."[84] It went on to

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[74] *See id*. at 1478.

[75] *Id*. at 1478-79 (citing S. REP. NO. 81-1515, at 55 (1950)).

[76] *Id*. at 1479.

[77] *Id*. (citing Immigration and Nationality Act of 1917, 39 Stat. 890).

[78] *Id*. (quoting Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986)).

[79] *Id*. at 1480 (citing 1952 Immigration and Nationality Act, 8 U.S.C. § 1251(a) (1), (4) (1994)).

[80] *Id*. (citing 104 Stat. 5050 (1990)).

[81] *Id*. (citing 110 Stat. 3009-596 (1996)).

[82] *Id*.

[83] *Id*.

[84] *See id*. at 1482 (citing NATIONAL LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL REPRESENTATION § 6.2 (1995); G. HERMAN, PLEA BARGAINING § 3.03, 20-21 (1997); Chin & Holmes, *Effective Assistance of Counsel*

conclude that because the first prong of the *Strickland* test is governed by "'reasonableness under prevailing professional norms,'" a defense attorney who fails to provide her client with immigration advice regarding his guilty plea falls below what is constitutionally required of her, especially where the immigration law is clear.[85] The Court rejected the notion that requiring counsel to give such advice under *Strickland* would have a vast impact on the finality of past guilty pleas.[86] Instead, the Court relied on the idea that defense attorneys had already been imposing this requirement on themselves in order to justify its expansive holding that defense counsel must not only refrain from giving incorrect advice regarding the deportation consequences of taking a guilty plea, but must take affirmative action to provide her client available information on this topic.[87] Here, the *Padilla* Court seems to have ignored the fact that multiple courts have held that defense counsel's failure to provide immigration advice does not constitute an ineffective assistance of counsel claim, and that for these cases to have been decided, there must have been a considerable number of defense attorneys who were not, and most likely still are not, in the practice of providing their clients with advice regarding the possible deportation consequences of their legal actions.[88] The

and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 713-18 (2002); A. CAMPBELL, LAW OF SENTENCING § 13:23, 555, 560 (3d ed. 2004); DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, 2 COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS, STANDARDS FOR ATTORNEY PERFORMANCE, at D10, H8-H9, J8 (2000); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-5.1(a), 197 (3d ed. 1993); ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14-3.2(f), 116 (3d ed. 1999)).

[85] *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)). Acknowledging that "[i]mmigration law can be complex, and . . . is a legal specialty of its own," the Court makes a distinction between the duties of defense counsel when an immigration statute is clear as opposed to when it is unclear. *Id.* at 1483. In Mr. Padilla's case, the Court deemed the immigration statute at issue "succinct, clear, and explicit in defining . . . removal consequences." *Id.*; *see also supra* note 5 (providing the text of the statute). Therefore, because "[t]he consequences of Padilla's plea could easily be determined from reading the removal statute, [and] his deportation was presumptively mandatory," his counsel should have given correct advice on the risk of deportation, and failing to do so rendered his conduct constitutionally deficient. *Padilla*, 130 S. Ct. at 1483. However, the Court allowed that "[w]hen the law is not succinct and straightforward" defense counsel need only "advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* But the Court failed to sufficiently explain what qualifies as "succinct and straightforward" and what does not. *See* discussion *infra* Part III.B.

[86] *Padilla*, 130 S. Ct. at 1485.

[87] *Id.* at 1482-85.

[88] *See id.* at 1481 (citing Santos-Sanchez v. United States, 548 F.3d 327 (5th Cir. 2008); Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004); United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000); United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988); United States v.

Court thus opened the door for a potentially large number of post-*Padilla* ineffective assistance of counsel claims.

B. The Court's Refusal to Classify Deportation as a Direct or Collateral Consequence of Conviction

Before certiorari was granted, the Supreme Court of Kentucky held that Mr. Padilla's claim was not subject to the protections of the Sixth Amendment right to effective assistance of counsel because immigration, as a collateral issue, falls outside the scope of this protection.[89] However, in *Padilla*, the Supreme Court rejected this idea, stating that the Court had never adopted the habit of distinguishing between direct and collateral consequences when applying the standards for ineffective assistance of counsel.[90] The Court ultimately decided not to rule on whether immigration consequences are direct or collateral to convictions, noting that making such a judgment would be "uniquely difficult," because of deportation's "close connection to the criminal process," and deeming such a distinction unnecessary "because of the unique nature of deportation."[91] Instead, the Court relied on the fact that while deportation is not a "criminal sanction" per se, it is undeniably very much intertwined with the criminal justice system.[92] Additionally, the Court focused on the idea that immigration laws have become so strict in recent years that "removal [is now a] nearly automatic result for a broad class of noncitizen offenders."[93] Therefore, because it may be very difficult for these defendants to see the difference between their criminal

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Campbell, 778 F.2d 764 (11th Cir. 1985); Oyekoya v. State, 558 So. 2d 990 (Ala. Ct. Crim. App. 1989); State v. Rosas, 904 P.2d 1245 (Ariz. Ct. App. 1995); State v. Montalban, 810 So. 2d 1106 (La. 2002); Commonwealth v. Frometa, 555 A.2d 92 (Pa. 1989)); *see also* Cruz, *supra* note 56, at 64 & n.134 (commenting that "the reality of a mandatory duty [to give immigration advice] raised some eyebrows amongst practitioners" (citing Mark Bennett, Padilla v. Kentucky, DEFENDING PEOPLE: THE TAO OF CRIMINAL DEFENSE TRIAL LAWYERING (Mar. 31, 2010, 8:38 PM), http://bennettandbennett.com/blog/2010/03/padilla-v-kentucky.html)). This blog notes that prior to *Padilla*, in Texas, while "[t]horough and competent criminal-defense lawyers would determine the immigration consequences and advise[] their clients of them . . . not all criminal-defense lawyers are thorough and competent, and it's much easier to get the Padillas of the world to plead guilty if you gloss over those nasty consequences." *Id.*

[89] Commonwealth v. Padilla, 253 S.W.3d 482, 485 (Ky. 2008), *rev'd and remanded sub nom.* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

[90] *Padilla*, 130 S. Ct. at 1481.

[91] *Id.* at 1481-82.

[92] *Id.* at 1481.

[93] *Id.*

sentence and their resulting civil deportation, the criminal justice system should not differentiate between the two either.[94] Although the Court refused to draw a line between direct and collateral consequences, it did seem to adopt the arguments made by critics of the collateral consequences doctrine.[95] The Court essentially ruled that because deportation is an immediate and serious consequence of criminal conviction, a criminal defense attorney should be required to provide immigration advice to a noncitizen client contemplating a guilty plea, lest her assistance subsequently be deemed ineffective.[96] While this is certainly a victory for noncitizen defendants, and a step toward well-rounded advocacy, it does leave the door wide open for ineffective assistance of counsel claims to succeed in regard to a number of other consequences that have previously been deemed collateral.[97]

III. LOWER COURT INTERPRETATIONS OF *PADILLA*

There are a number of questions that *Padilla* leaves unanswered, which presumably could have been foreseen when the decision was announced. For example, the Court did not make explicit whether its decision was intended to be applied retroactively, nor did it enunciate the standard that should be used to distinguish between clear and unclear immigration laws.[98] There are also several issues that have presented themselves as the lower courts have tried to apply the decision in *Padilla* that the Court may not have anticipated. For example, in the wake of *Padilla*, it is unclear whether a claim for postconviction relief will ever turn on whether the judge taking a plea has advised the defendant of the possible removal consequences of a guilty plea, without regard to what the defendant's counsel discussed with him;[99] whether a criminal defense attorney may direct her client to an independent

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[94] *Id.* at 1481-82 (citing INS v. St. Cyr., 533 U.S. 289, 322 (2001)).

[95] *See* discussion *supra* Part I.B.

[96] *Padilla*, 130 S. Ct. at 1481.

[97] *See* discussion *infra* Part III.E (discussing a case in which the Court of Appeals of Georgia held that failing to advise a defendant that his guilty plea would result in his having to register as a sex offender satisfied the first prong of the *Strickland* test and suggesting that the same result could easily be reached where counsel fails to advise a defendant that pleading guilty will result in the loss of the right to vote).

[98] *See generally Padilla*, 130 S. Ct. 1473.

[99] *See, e.g.*, United States v. Bhindar, No. 07 Cr 711-04 (LAP), 2010 WL 2633858 (S.D.N.Y. June 30, 2010); United States v. Hernandez-Monreal, Nos. 1:07cr337 (LMB), 1:10cv618 (LMB), 2010 WL 2400006 (E.D. Va. June 14, 2010); Ellington v. United States, No. 09 Civ. 4539 (HB), 2010 WL 1631497 (S.D.N.Y. Apr. 20, 2010); Smith v. State, 697 S.E.2d 177 (Ga. 2010); State v. Romos, No. 09-0585, 2010 WL 2598630 (Iowa Ct. App. June 30, 2010); People v. Garcia, 907 N.Y.S.2d 398 (N.Y. Sup. Ct. 2010).

immigration specialist once she has recognized that his case implicates immigration concerns;[100] and whether courts will expand *Padilla* to create ineffective assistance of counsel claims for other consequences that have previously been deemed collateral.[101]

A. Retroactivity

In setting forth the obligations that criminal defense attorneys have to noncitizen defendants taking guilty pleas, the *Padilla* Court left open the problematic question of whether these constitutionally required standards should be applied retroactively.[102] The doctrine of retroactivity is generally concerned with whether a new legal rule should be applied to judicial decisions that came before the pronouncement of the rule.[103] The Supreme Court set forth its current doctrine on retroactivity in its 1989 *Teague v. Lane* opinion,[104] but the doctrine is more clearly explained in the Court's *Whorton v. Bockting* decision.[105] In *Whorton*, the Court explained that "an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review."[106] A new rule is one which "was not dictated by the governing precedent existing at the time when respondent's conviction became final."[107] In order for a new rule to be retroactively applicable in a collateral proceeding, it must be either substantive, or "'a watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[108] A substantive rule, as opposed to a procedural rule, is one that puts "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[109] In other words, a

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[100] *See, e.g.*, Grigorian v. United States, Nos. 09-22708-Cv-Martinez, 05-60203-Cr-Martinez, 2010 WL 2889929 (S.D. Fla. June 18, 2000), *adopted by* United States v. Grigorian, No. 09-22708-CIV, 2010 WL 2884890 (S.D. Fla. July 21, 2010); People v. Garcia, 907 N.Y.S.2d 398 (N.Y. Sup. Ct. 2010).

[101] *See, e.g.*, Taylor v. State, 698 S.E.2d 384 (Ga. Ct. App. 2010).

[102] *See Padilla*, 130 S. Ct. 1473.

[103] *See* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE CASES AND COMMENTARY 16 (9th ed. 2010).

[104] 489 U.S. 288 (1989); Tom Cummins, Comment, Danforth v. Minnesota*: The Confrontation Clause, Retroactivity, and Federalism*, 17 GEO. MASON L. REV. 255, 268-69 (2009).

[105] *See* 549 U.S. 406 (2007).

[106] *Id.* at 416 (citing Griffith v. Kentucky, 479 U.S. 314 (1987)).

[107] *Id.* at 417.

[108] *Id.* at 416 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).

[109] *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

substantive rule changes what is thought of as a crime. A procedural rule can only be deemed watershed if it is "necessary to prevent 'an impermissibly large risk' of an inaccurate conviction," and it "'alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'"[110] Notably, it has been over two decades since *Teague* was announced and the Court has not once applied a new rule retroactively.[111]

In setting forth the obligations that criminal defense attorneys have to noncitizen defendants taking guilty pleas in *Padilla*, the Supreme Court left open the question of whether these constitutionally required standards should be applied retroactively. When the Supreme Court failed to rule on the issue of retroactivity, that decision was pushed down to the lower courts. Although it appears that a slight majority of lower courts has applied *Padilla* retroactively, there are also several courts that have declined to do so.[112] In order to understand why it is ultimately more logical to apply *Padilla* retroactively, it may be useful to examine two cases that were heard in different counties within the same city, but reached different conclusions on the matter.[113]

1. The Case for Retroactive Application: *People v. Bennett*

In *People v. Bennett*, the Criminal Court for the City of New York, Bronx County, decided that *Padilla* should be

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[110] *Bockting*, 549 U.S. at 418 (quoting Schriro v. Summerlin, 542 U.S. 348, 356 (2004)).

[111] Cummins, *supra* note 104, at 269. The only rule that the Court has ever deemed "watershed" was set forth in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and requires that counsel be appointed for all indigent defendants facing felony charges. *Id.* at 339, 344-45.

[112] *Compare* Luna v. United States, No. 10CV1659 JLS, 2010 WL 4868062 (S.D. Cal. Nov. 23, 2010), *and* Martin v. U.S., No. 09-1387, 2010 WL 3463949 (C.D. Ill. Aug. 25, 2010), *and* United States v. Chaidez, 730 F. Supp. 2d 896 (N.D. Ill. 2010), *and* Al Kokobani v. United States, Nos. 5:06-cr-207, 5:08-cv-177, 2010 WL 3941836 (E.D.N.C. July 30, 2010), *and* United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625 (E.D. Cal. July 1, 2010), *and* United States v. Millan, Nos. 3:06cr458, 3:10cv165, 2010 WL 2557699 (N.D. Fla. May 24, 2010), *and* People v. Garcia, 907 N.Y.S.2d 398 (N.Y. Sup. Ct. 2010), *and* People v. Bennett, 903 N.Y.S.2d 696 (N.Y. Crim. Ct. 2010) (all holding that *Padilla* is to be applied retroactively), *with* Doan v. United States, 760 F. Supp. 2d 602 (E.D. Va. 2011), *and* United States v. Perez, No. 8:02CR296, 2010 WL 4643033 (D. Neb. Nov. 9, 2010), *and* United States v. Gilbert, No. 2:03-cr-00349, 2010 WL 4134286 (D.N.J. Oct. 19, 2010), *and* Gacko v. United States, No. 09-CV-4938, 2010 WL 2076020 (E.D.N.Y. May 20, 2010), *and* People v. Kabre, 905 N.Y.S.2d 887 (N.Y. Crim. Ct. 2010) (all holding that *Padilla* is not to be applied retroactively).

[113] *See Kabre*, 905 N.Y.S.2d 887; *Bennett*, 903 N.Y.S.2d 696.

applied retroactively.[114] Jermaine Bennett pleaded guilty to criminal possession of marijuana in the fifth degree in December 2005.[115] He filed no direct appeals, but in November 2009, he collaterally attacked his conviction by filing a motion to vacate the judgment against him on the basis that his defense attorney had made "affirmative misrepresentations and omissions of information concerning the immigration consequences of [his] plea."[116] Because Mr. Bennett's conviction became final before *Padilla* was decided, the Bronx County Criminal Court was forced to decide whether *Padilla* restated an old rule, which would be applicable to Mr. Bennett's case, or a new rule, which would not be applicable to Mr. Bennett's case unless it was a substantive rule, or a watershed rule of criminal procedure.[117]

There was no occasion for the Bronx County Court to determine if the *Padilla* rule was substantive or watershed because it found that the Supreme Court's decision "did not announce a new constitutional rule, but merely applied the well-settled rule in *Strickland* to a particular set of facts."[118] In its *Bennett* opinion, the Bronx County Court quoted *Teague* in defining a new rule as one which "'was not dictated by precedent existing at the time the defendant's conviction became final,'"[119] and concluded that the *Padilla* Court had not overruled precedent, but had simply "held that *Strickland* applies to advice concerning deportation."[120] In finding that *Padilla* simply articulates an old rule, the Bronx County Court also relied on the Supreme Court's holding in *Williams v. Taylor*: "merely applying *Strickland* to a new scenario does not create a new rule, as 'it can hardly be said that recognizing the right to effective counsel breaks new ground or imposes a new obligation on the States.'"[121] In ruling this way, the Bronx County Court also relied on its own inference that the Supreme Court in *Padilla* intended for its decision to be applied retroactively.[122] The County Court reasoned that if this had not

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[114] *Bennett*, 903 N.Y.S.2d at 700. It is notable that *Bennett* was decided on May 26, 2010, just two short months after *Padilla* came down from the Supreme Court.

[115] *Id.* at 697.

[116] *Id.*

[117] *See id.* at 698-700; *see supra* notes 103-11 and accompanying text (discussing the application of old and new constitutional rules).

[118] *Bennett*, 903 N.Y.S.2d at 699.

[119] *Id.* (emphasis omitted) (quoting Teague v. Lane, 489 U.S. 288, 301 (1989)).

[120] *Id.* (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1485 n.12 (2010)).

[121] *Id.* (citing Williams v. Taylor, 529 U.S. 362, 391 (2000)).

[122] *Id.* at 700.

been the Supreme Court's intention, it would not have felt the need to comment that its decision "would [not] open the 'floodgates' of challenges to guilty pleas."[123]

2. The Case against Retroactive Application: *People v. Kabre*

In *People v. Kabre*, the Criminal Court for the City of New York, New York County, reached the opposite conclusion from the Bronx County Court, holding the *Padilla* rule to be inapplicable retroactively on collateral review, at least as to misdemeanor convictions.[124] The *Kabre* Court faced a situation similar to that which the *Bennett* Court had faced. Misdemeanor charges were brought against a noncitizen defendant who pleaded guilty and did not file a direct appeal, but subsequently collaterally attacked his plea on the basis that his attorney had been ineffective in failing to advise him, or incorrectly advising him, of the possible immigration consequences of pleading guilty.[125] However, unlike the Bronx County Court, the New York County Court did not find that *Padilla* merely restated an old rule, but rather that it set forth "a new rule of constitutional criminal procedure."[126] Thereafter, the New York County Court reasoned that since such new rules can only be taken advantage of on collateral attack under certain conditions not satisfied in this case, Mr. Kabre's claims should simply be decided under the relevant New York State law at the time that the attorney conduct took place, as it is set forth in *People v. Ford*.[127] Mr. Kabre's attack on his attorney's effectiveness did not succeed under this standard, as *Ford* specifically held that failing to advise of possible immigration consequences does not constitute ineffective assistance, as

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[123] *Id.* (citing *Padilla*, 130 S. Ct. at 1485). The Supreme Court reasoned that its decision would not "have a significant effect on those convictions already obtained as the result of plea bargains" because "[f]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Padilla*, 130 S. Ct. at 1485. It is interesting to note how many cases have since been brought alleging ineffective assistance of counsel in regard to immigration advice and requiring lower courts to decide whether *Padilla* applies retroactively. *See supra* note 112.

[124] People v. Kabre, 905 N.Y.S.2d 887, 889 (2010). Although the Bronx County Court in *Bennett* does not explicitly limit its holding to misdemeanor convictions, it is notable that the contested plea in that case was to New York Penal Law section 221.10 (2), which is a class B misdemeanor. N.Y. PENAL LAW § 221.10 (2) (McKinney 2008); *Bennett*, 903 N.Y.S.2d at 697.

[125] *See Kabre*, 905 N.Y.S.2d at 890.

[126] *See id.* at 889.

[127] *Id.* at 889-90; *see* People v. Ford, 86 N.Y.2d 397 (1995); *see also supra* notes 103-11 and accompanying text (discussing the application of old and new constitutional rules).

deportation is only a collateral consequence of criminal conviction.[128] The New York County Court wrote off any indications that the Supreme Court believed *Padilla* would apply retroactively on collateral attack, noting that whatever comments the Court may have made, it of course intended for the *Teague* test to be applied to the *Padilla* holding.[129]

In deciding whether to apply *Padilla* retroactively, the New York County Court first examined the state of the law in 2005, when Mr. Kabre's conviction was finalized.[130] The New York County Court stated that before *Padilla*, "the Supreme Court had never held that [criminal] defense counsel . . . had any . . . responsibility to advise an alien defendant of the potential consequences of a conviction under the immigration laws," and that all the United States Courts of Appeals to be confronted with this issue had found that deportation was "a collateral consequence of [a guilty plea] and that defense counsel was not ineffective for failing to advise about deportation or any other potential immigration consequence of a criminal conviction."[131] The County Court then noted that most state courts, including New York state courts, had reached the same conclusion.[132] Under New York law

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[128] *Kabre*, 905 N.Y.S.2d at 889, 901 (citing *Ford*, 86 N.Y.2d at 404). It is noteworthy that at the time of Mr. Kabre's adjudication, New York law did require that any immigration advice counsel chose to provide to her client be correct. *See id.* at 890 (citing People v. McDonald, 802 N.E.2d 131 (2003)). However, it is unclear whether Mr. Kabre's attorney gave him incorrect immigration advice or no advice at all. *Id.*

[129] *See id.* at 897-98; *see supra* notes 103-11 and accompanying text (discussing the *Teague* retroactivity standard).

[130] *See Kabre*, 905 N.Y.S.2d at 892-95.

[131] *Id.* at 892-93 (citing Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004); United States v. Fry, 322 F.3d 1198 (9th Cir. 2000); United States v. Gonzalez, 202 F.3d 20 (1st Cir. 2000); United States v. Banda, 1 F.3d 354 (5th Cir. 1993); United States v. Del Rosario, 902 F.2d 55 (D.C. Cir. 1990); United States v. George, 869 F.2d 333 (7th Cir. 1989); United States v. Yearwood, 863 F.2d 6 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764 (11th Cir.1985); United States v. Santelises, 476 F.2d 787 (2d Cir. 1973)).

[132] *See id.* at 893-94 (citing Rumpel v. State, 847 So. 2d 399 (Ala. Crim. App. 2002); Tafoya v. State, 500 P.2d 247 (Alaska 1972); State v. Rosas, 904 P.2d 1245 (Ariz. Ct. App. 1995); Christie v. State, 655 A.2d 306 (Del. 1994); State v. Ginebra, 511 So. 2d 960 (Fla. 1987); People v. Huante, 571 N.E.2d 736 (Ill. 1991); State v. Ramirez, 636 N.W.2d 740 (Iowa 2001); State v. Muriithi, 46 P.3d 1145 (Kan. 2002); Commonwealth v. Fuartado, 170 S.W.3d 384 (Ky. 2005); State v. Montalban, 810 So. 2d 1106 (La. 2002); People v. Davidovich, 606 N.W.2d 387 (Mich. Ct. App. 1999), *aff'd* 618 N.W.2d 579 (Mich. 2000); Alanis v. State, 583 N.W.2d 573 (Minn. 1998); State v. Zarate, 651 N.W.2d 215 (Neb. 2002); Barajas v. State, 991 P.2d 474 (Nev. 1999); State v. Dalman, 520 N.W.2d 860 (N.D. 1994); People v. Ford, 657 N.E.2d 265, 267-68 (N.Y. 1995); Commonwealth v. Frometa, 555 A.2d 92 (Pa. 1989); Nikolaev v. Weber, 705 N.W.2d 72 (S.D. 2005); Bautista v. State, 160 S.W.3d 917 (Tenn. Crim. App. 2004); Perez v. State, 31 S.W.3d 365 (Tex. Civ. App. 2000); State v. Rojas-Martinez, 125 P.3d 930 (Utah 2005); State v. Martinez-Lazo, 999 P.2d 1275 (Wash. Ct. App. 2000); State v. Santos, 401 N.W.2d 856 (Wis. Ct. App. 1987)).

specifically, in 2005, counsel could be deemed ineffective for providing a client with incorrect advice regarding collateral consequences of a plea,[133] but could avoid the issue altogether by remaining silent on collateral issues.[134] In *Padilla*, the Supreme Court actually adopted an approach taken only by a few states which had previously refused to recognize a strict divide between direct and collateral consequences on the basis that deportation is so harsh a sanction.[135]

After setting out the state of the law, the New York County Court then employed three different tests previously set forth by the Supreme Court in order to come to its conclusion that the *Padilla* decision created a new rule.[136] First, the County Court asked whether the Supreme Court's *Padilla* decision was "'dictated' by precedent."[137] Observing that in 2005 neither the Supreme Court, nor the federal circuit courts, nor the majority of the state courts, nor the New York state courts, had held that "counsel's failure to apprise a defendant of the immigration consequences of a plea [constituted] ineffective assistance or that the distinction between direct and collateral consequences was [irrelevant] to [a claim of] [in]effective assistance of counsel," the New York County Court concluded that the *Padilla* decision was not required by any previous decision.[138] Second, the New York County Court analyzed the question by asking whether the Supreme Court's decision "overruled past authority," noting that "a decision which overrules a prior case is obviously a new rule."[139] Although *Padilla* did not overrule Supreme Court precedent, as there was

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[133] *Id.* at 895 (citing *McDonald*, 802 N.E.2d 131).

[134] *Id.* at 894-95 (citing *Ford*, 657 N.E.2d at 267).

[135] *See id.* at 894 (citing Williams v. State, 641 N.E.2d 44 (Ind. Ct. App. 1994); State v. Paredez, 101 P.3d 799 (N.M. 2004)). The New York County Court also notes that there are a few other courts that have used other lines of reasoning when considering ineffective assistance of counsel claims and the immigration effects of guilty pleas. *Id.* at 894 n.5. For example, the Colorado Supreme Court has held that "if counsel ha[s] reason to believe that a defendant [is] an alien there [is] a duty to investigate the immigration consequences of a conviction." *Id.* (citing People v. Pozo, 746 P.2d 523 (Co. 1987)). Although the California Supreme Court has had an opportunity to rule on whether failing to advise a criminal defendant of the immigration effects of a plea constitutes ineffective assistance of counsel, it has chosen not to do so, holding only "that the 'collateral' nature of such ramifications d[oes] not foreclose an ineffective assistance claim." *Id.* (citing *In re* Resendiz, 19 P.3d 1171 (Cal. 2001)).

[136] *See id.* at 895-98.

[137] *Id.* at 895 (citing Teague v. Lane, 489 U.S. 288, 301 (1989); Butler v. McKellar, 494 U.S. 407, 412 (1990); Saffle v. Parks, 494 U.S. 484, 488 (1990); People v. Eastman, 648 N.E.2d 459, 465 (N.Y. 1995)).

[138] *Id.*

[139] *Id.* at 896 (citing Butler v. McKellar, 494 U.S. 407, 412 (1990)).

none on point, it did in effect overrule the opinions of all the federal circuit courts that had confronted the issue, and of the majority of the state courts.[140] In this way, *Padilla* "certainly has . . . established a new rule in those jurisdictions."[141] The last test under which the New York County Court analyzed whether *Padilla* sets forth a new rule asks whether "the 'unlawfulness of [defendant]'s conviction was apparent to all reasonable jurists.'"[142] The court reasoned that any such unlawfulness would certainly not be obvious, seeing as the majority of the federal circuit courts and state courts had previously found that petitioners similarly situated to Mr. Padilla had no valid claims for ineffective assistance of counsel.[143] Based on these three findings, the New York County Court then concluded that *Padilla* did in fact set forth a new constitutional rule.[144]

After deciding that *Padilla* set forth a new rule, the New York County Court explained why neither of the two new rule exceptions set forth in *Teague* applied to the matter at hand.[145] The County Court first set forth that the only of the two exceptions that the *Padilla* rule could possibly fit into is that of the "'watershed' rules which alter a 'bedrock procedural element of criminal procedure which implicates the fundamental fairness and accuracy of the trial.'"[146] The New York County Court then contrasted the *Padilla* rule with the right to counsel rule that was established under *Gideon v. Wainwright*, the only case to have ever been acknowledged as establishing a "watershed" rule.[147] The County Court stated that the *Padilla* rule is simply "not as sweeping and

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[140] *Id.*; *see also supra* notes 88, 131-32 and accompanying text.

[141] *Kabre*, 905 N.Y.S.2d at 896.

[142] *Id.* (citing Beard v. Banks, 542 U.S. 406, 413 (2004)).

[143] *See id.*

[144] *Id.* at 897. In holding that *Padilla* set forth a new rule, the New York County Court also took to tearing down the Bronx County Court's reasoning about why *Padilla* is merely a restatement of an old rule. *Id.* at 896-98. The New York County Court rails hardest against the Bronx Court's contention that "any holding expanding the scope of the Sixth Amendment right under *Strickland* cannot be a new rule but is necessarily an application of settled law . . . to new facts." *See id.* at 896. The New York County Court submits that the issue in *Padilla* "was not whether an alien defendant has the same right to a competent lawyer as . . . a citizen defendant [does under *Strickland*], but whether the scope of that representation extends to giving advice about the [immigration] consequences of a conviction." *Id.* at 897.

[145] *See id.* at 892-900; *see supra* notes 108-11 and accompanying text.

[146] *Kabre*, 905 N.Y.S.2d at 898 (quoting Teague v. Lane, 489 U.S. 288, 311-12 (1989); People v. Eastman, 648 N.E.2d 459, 465 (N.Y. 1995)).

[147] *Id.* at 899 (citing Whorton v. Bockting, 549 U.S. 406, 419 (2008)); *see* Gideon v. Wainwright, 372 U.S. 335 (1963).

fundamental as that of *Gideon*."[148] When these rules are applied to Mr. Kabre's case, it is clear that while "[i]t is unconscionable to convict and incarcerate a defendant who had no lawyer to give advice about the legal process, present a defense, or argue for leniency," the same cannot be said about "deny[ing] a hearing about what immigration advice was given six years ago or more to a defendant who already had a substantial criminal record and avoided incarceration by taking a plea."[149] Unable to fit the new *Padilla* rule into one of the known new rule exceptions, the New York County Court held that the rule was not applicable to Mr. Kabre's collateral attack of his conviction, and that his claim should simply be evaluated under the laws of New York as they existed at the time of conviction.[150]

3. Illogically, Lower Courts Rule in Favor of Retroactivity

When deciding whether a rule should be applied retroactively, the *Teague* analysis, for all practical purposes, stops at whether a rule is to be considered old or new. This is because the Court has never held a new rule to fall into either of the two new rule exceptions, substantive or watershed procedural rule, and to therefore be applicable retroactively.[151] Therefore, it is important to focus on whether a holding simply restates an old rule, or creates a new rule by stating a principle not dictated by precedent, by overruling precedent, or by stating some principle that was not clearly true to all courts beforehand.[152] Looking to the lower courts, it is clear that prior to *Padilla*, it was not settled that criminal defense attorneys had an affirmative obligation under the Constitution to provide immigration advice to their clients taking plea bargains.[153] Before this decision, most courts found immigration to be wholly collateral to a criminal conviction.[154] *Padilla* has thus set forth a new rule, which would not be applicable on collateral attack. The strongest argument for deciding conversely that *Padilla* actually reiterated an old rule, and can therefore be applied retroactively

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[148] *Id.*

[149] *Id.* Mr. Kabre had six previous counterfeiting convictions. *See id.* at 890.

[150] *Id.* at 900.

[151] *See supra* note 111 and accompanying text.

[152] *See supra* notes 136-44 and accompanying text (discussing three tests the Supreme Court has used in the past to determine whether a rule should be considered "new").

[153] *See supra* notes 88, 131-32 and accompanying text.

[154] *See supra* note 55 and accompanying text.

on collateral review, is the "floodgates" language in the Court's opinion which predicts it "unlikely that [*Padilla*] will have a significant effect on those convictions already obtained as a result of plea bargains."[155] However, the Court could simply be suggesting that few *Padilla* claims will be brought on direct review. In that case, we gain no insight about whether *Padilla* articulated a new rule, which may be applied only on direct review, or an old rule, which may be applied retroactively on direct review or collateral review.[156] Additionally, although the Court did not explicitly express its opinion or rule on retroactivity, a slight majority of lower courts have found that *Padilla* is applicable on collateral attack.[157]

B. Differentiating Between Clear and Unclear Immigration Law

Another issue that the majority opinion in *Padilla* left unresolved is the standard to be used to distinguish between clear and unclear immigration laws.[158] Surprisingly, this does not now seem to be a topic occupying much of the time of the various lower courts considering *Padilla*-based ineffective assistance of counsel claims.[159] One example of a case in which this distinction does do work is *People v. Cristache*, in which the defendant originally pleaded guilty to several charges in the Queens Misdemeanor Treatment Court of the City of New York (QMTC), based on the promise that if he completed a drug treatment program, his pleas would be vacated and his cases dismissed and sealed.[160] After leaving the treatment program several times, and being re-arrested several times as well, Mr.

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[155] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010).

[156] *See supra* notes 103-11 and accompanying text (discussing the application of old and new constitutional rules).

[157] *See supra* note 112 and accompanying text.

[158] *See supra* note 85.

[159] *See Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring) ("The Court . . . holds that a criminal defense attorney must provide advice in th[e] specialized area [of immigration] in those cases in which the law is 'succinct and straightforward'—but not, perhaps, in other situations. This vague, halfway test will lead to much confusion and needless litigation." (citation omitted)). One explanation for why state courts have shied away from distinguishing clear from unclear immigration laws is that they simply do not have the ability to do so. *See* César Cuauhtémoc García Hernández, *When State Courts Meet* Padilla*: A Concerted Effort Is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299, 311 (2011) (stating that "state courts . . . are not sufficiently familiar with immigration law to determine when deportation will clearly result from pleading guilty to a particular offense").

[160] People v. Cristache, 907 N.Y.S.2d 833, 834-36 (N.Y. Crim. Ct. 2010).

Cristache was eventually sentenced to several months in jail.[161] Two months after his sentencing, Mr. Cristache moved to have his pleas vacated under *Padilla* on the basis that his defense attorney had not informed him of the potential immigration consequences of his guilty pleas.[162]

In this case, whether defense counsel's advice was effective under *Strickland* turned on whether the immigration law surrounding Mr. Cristache's guilty pleas was clear or unclear.[163] The *Cristache* Court determined that although the defendant had pleaded guilty to crimes that qualified as removable offenses, they were not of the sort "which would have clearly subjected him to 'automatic' or 'mandatory' removal or deportation," as they would not be classified as "aggravated felon[ies]."[164] Therefore, the *Cristache* Court reasoned that here, "where the removal 'consequences of [defendant's] . . . plea[s] . . . [were] unclear or uncertain,'" defense counsel was required to "'do no more than advise [defendant] that pending criminal charges may carry a risk of adverse immigration consequences.'"[165] The *Cristache* Court found that defense counsel in this case did in fact do enough to satisfy the *Padilla* rule by advising defendant that "he would have a criminal record . . . and he would have immigration consequences," if he did not complete his court-mandated drug treatment program.[166] While it would have been more favorable for defense counsel to have expounded upon this advice, ultimately she gave enough advice so that her conduct was not "constitutionally deficient under the performance prong of *Strickland*."[167]

The *Cristache* Court demonstrated how the distinction between clear and unclear immigration laws can be used to limit how many of the numerous ineffective assistance of counsel claims that have arisen since *Padilla* was announced will succeed. Although few post-*Padilla* courts have used this

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[161] *Id.* at 836.

[162] *Id.* at 836-37.

[163] *See id.* at 842-46.

[164] *Id.* at 842-43 (citing 8 U.S.C. § 1101(a)(43); 8 U.S.C. § 1227 (a)(2)(A)(iii); INS v. St. Cyr, 533 U.S. 289, 325 (2001); Zhang v. United States, 506 F.3d 162, 167 (2d Cir. 2007); People v. Argueta, 46 A.D.3d 46, 50 (N.Y. App. Div. 2007)).

[165] *Id.* at 843 (alterations in original) (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010)).

[166] *Id.* Although Mr. Cristache actually alleged that defense counsel gave him no advice at all regarding the possible immigration consequences of his pleas, the *Cristache* Court credited defense counsel's contention that indeed she did. *Id.*

For the argument that the *Cristache* Court misinterpreted the immigration law, and that Mr. Cristache's conviction actually "clearly subjected him to removal," see Hernández, *supra* note 159, at 319-22.

[167] *Cristache*, 907 N.Y.S.2d at 845.

distinction as the basis for their decisions, it would prove a useful tool if more liberally employed.

*C. The Role of the Judge in Post-*Padilla *Ineffective Assistance of Counsel Claims*

Although a claim of ineffective counsel brought under *Strickland* (and under *Padilla* when such claim is specifically regarding a failure to give immigration advice in relation to a guilty plea) normally focuses on the actions or inaction of defense counsel,[168] the presiding court's actions are also relevant.[169] In fact, several post-*Padilla* decisions in the lower courts have stated that where the court advised the defendant of the potential immigration consequences of his plea during the plea allocution, the defendant cannot satisfy the second "prejudice" prong of the *Strickland* test.[170] This seems to be a logical conclusion considering that the prejudice prong can only be satisfied for guilty pleas where, if not for defense counsel's errors, the defendant would have decided to go to trial.[171] It would be illogical for a defendant bringing an ineffective assistance of counsel claim to allege that he would have withdrawn his decision to plead guilty if only the words spoken to him by the court during his plea allocution had instead been uttered by his defense attorney. However, a few courts have nonetheless held that a defendant may succeed with such a claim regardless of the warnings given by the court.[172]

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[168] *See* discussion of *Strickland supra* Part I.A; *see* discussion of *Padilla supra* Part II.

[169] *See, e.g.*, United States v. Bhindar, No. 07Cr711-04, 2010 WL 2633858, at *6 (S.D.N.Y. June 30, 2010); United States v. Hernandez-Monreal, No. 1:07cr337, 1:10cv618, 2010 WL 2400006, at *2 (E.D. Va. June 14, 2010), *aff'd in part, dismissed in part*, 404 F. App'x 714 (4th Cir. 2010); Ellington v. United States, No. 09CIV4539, 2010 WL 1631497, at *3 (S.D.N.Y. Apr. 20, 2010); Flores v. State, 57 So. 3d 218, 218-21 (Fla. Dist. Ct. App. 2010); People v. DeJesus, No. 10335/98, 2010 WL 5300535, at *11-12 (N.Y. Sup. Ct. Dec. 24, 2010); People v. Garcia, 907 N.Y.S.2d 398, 405-07 (N.Y. Sup. Ct. 2010).

[170] *Bhindar*, 2010 WL 2633858, at *6; *Ellington*, 2010 WL 1631497, at *3; *Flores*, 57 So. 3d at 218-21.

[171] *See supra* note 40 and accompanying text.

[172] *See DeJesus*, 2010 WL 5300535, at *11-12; *Garcia*, 907 N.Y.S.2d at 405-07. It is unclear whether it is significant that both of these cases were decided in New York State courts (one in Kings County and one in New York County). It is possible that New York State courts are more sympathetic to defendants bringing ineffective assistance of counsel claims under *Padilla* than are the federal courts, or the courts of other states. However, it is also possible that New York State, especially New York City, simply deals with a greater quantity of such claims, and this just happens to be how these two specific cases came out. It is also important to note that New York City has not been so liberal in regard to all aspects of claims brought under *Padilla*. For

1. If the Defendant Was on Notice, He Cannot Prove Prejudice

Among the courts that have explicitly noted that a court's warning regarding immigration consequences is enough to defeat a *Strickland* claim under the prejudice prong are the Southern District of New York and the District Court of Appeal of Florida.[173] In *Ellington v. United States*, the Southern District found that where the judge who took the plea allocution asked the defendant, "Do you recognize that your plea of guilty . . . may affect your ability to remain within the United States?" and the defendant replied, "Yes," it was irrelevant whether defense counsel had informed the defendant of the possible deportation consequences of entering a plea.[174] This was because the judge had "explained the issue in open court."[175] In *United States v. Bhindar*, the Southern District reiterated this principle, stating that the defendant "would be hard-pressed to show that the ineffective assistance of counsel prejudiced his defense" where he had verbally indicated his understanding after the judge taking his plea told him, "[O]ne of the consequences of your plea, if you are not a citizen of the United States is that, at the conclusion of your sentence, you will be removed from the United States."[176] The court ruled this way despite the fact that the defendant was not claiming that his counsel had failed to advise him, but that he had actually given him misinformation.[177] This was because the court's warning had put the defendant on notice that there would in fact be immigration consequences from entering a plea of guilty, regardless of what his attorney had previously told him.[178] In *Flores v. State*, the District Court of Appeal of Florida held that an ineffective assistance claim would fail under the second prong of *Strickland* where the court gave correct immigration advice during the plea colloquy, even though defense counsel had previously given incorrect immigration advice that the defendant thought safe to follow.[179] In this case,

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example, Part III.A.2 discusses a New York County case in which the court decided that *Padilla* should not apply retroactively.

[173] *See Bhindar*, 2010 WL 2633858, at *6; *Ellington*, 2010 WL 1631497, at *3; *Flores*, 57 So. 3d at 218-21.

[174] *Ellington*, 2010 WL 1631497, at *3.

[175] *Id.*

[176] *Bhindar*, 2010 WL 2633858, at *5-6.

[177] *Id.* at *3-5.

[178] *Id.* at *6 (citing Zhang v. United States, 506 F.3d 162, 169 (2d Cir. 2007)).

[179] Flores v. State, 57 So. 3d 218, 220 (Fla. Dist. Ct. App. 2010).

the court relied mainly on the principle that the defendant had sworn during his plea that he understood the court's warning, and should not later be allowed to change his answer.[180]

2. But, the Defendant May Have Been Prejudiced if He Did Not Understand the Court's Warning

In contrast to the opinions of the Southern District of New York and the District Court of Appeal of Florida, the branches of the New York Supreme Court sitting in the Counties of Kings and New York have found that ineffective assistance claims may succeed even where the court warned the defendant of the possible immigration consequences of his plea.[181] In *People v. Garcia*, the New York Supreme Court for the County of Kings specifically rejected the Southern District's *Bhindar* holding, instead ruling that when a defendant has been misled by advice, or has not been given any advice, regarding the immigration consequences of entering a guilty plea, "the Court's general warning will not automatically cure counsel's failure nor erase the consequent prejudice."[182] Rather, a defendant in such a situation might still be able to succeed with a claim for ineffective assistance of counsel, as Mr. Garcia did.[183] Additionally, in *People v. DeJesus*, the New York Supreme Court for the County of New York held that where a defendant alleges that his attorney did not advise him of the deportation effects of his plea, that he did not understand the warning given by the court, and that he believed he could rely on his counsel's advice to enter a plea of guilty, he may still be able to satisfy the prejudice prong of the *Strickland* test.[184]

3. *Garcia* and *DeJesus* Prejudice the System

The *Garcia* and *DeJesus* decisions are counterintuitive, if not completely irrational. Although it is true that a *Strickland* claim is supposed to address the conduct of counsel and not of the court, it is far from clear how a defendant can remain prejudiced under the second *Strickland* prong by the lack of information or

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[180] *Flores*, 57 So. 3d at 220 (citing Iacono v. State, 930 So. 2d 829 (Fla. Dist. Ct. App. 2006)).

[181] *See* People v. DeJesus, No. 10335/98, 2010 WL 5300535, at *11-12 (N.Y. Sup. Ct. Dec. 24, 2010); People v. Garcia, 907 N.Y.S.2d 398, 406-07 (N.Y. Sup. Ct. 2010).

[182] *Garcia*, 907 N.Y.S.2d at 406-07.

[183] *Id.* at 407.

[184] *DeJesus*, 2010 WL 5300535, at *11-12.

misinformation supplied by counsel, after he is given correct information by the court. This is particularly hard to understand if it is assumed that anyone facing charges before a court knows that an attorney is present to provide assistance, but that the judge makes the final decisions. Additionally, decisions such as these leave the courts without a way to limit the number of claims for ineffective assistance of counsel brought under *Padilla*. Although courts could not possibly possess the resources to watch over every interaction between counsel and defendant, making sure the proper advice regarding guilty pleas and immigration is given,[185] they do have the ability to ask the defendant in open court during a plea colloquy whether the defendant was advised of the fact that his plea may result in deportation. If the court cannot rely on the defendant's answer to such a question, it is unclear how else a court could ensure that proper advice was given.

D. Determining When a Criminal Defense Attorney May Defer to an Immigration Specialist

In *Padilla*, the Court acknowledged that immigration law is a complex subject in its own right, and consequently limited the extent of the advice that is required when the pertinent immigration law is unclear.[186] However, even where the law appears clear, a criminal defense attorney might think it provident to consult with an immigration specialist before advising her client on the possible immigration ramifications of accepting a guilty plea, or perhaps to simply refer her client to such a specialist. By analyzing two cases that have emerged from this type of attorney conduct, it becomes clear that while a defense attorney may engage an immigration specialist to further assist her client, she does not satisfy her duty under *Padilla* by pleading ignorance of immigration law and telling her client to seek counsel elsewhere on that issue.[187] In cases such as these, it is important to focus on three questions: whether the criminal defense attorney has given any immigration advice at all; whether she actually facilitated contact with an immigration

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[185] The author is ignoring the confidentiality and privilege issues which would obviously be implicated if courts were to watch over the interactions between attorney and client, in order to make a point.

[186] *See supra* note 85.

[187] *See* Grigorian v. United States, Nos. 09-22708-Cv-Martinez, 05-60203-Cr-Martinez, 2010 WL 2889929 (S.D. Fla. June 18, 2010), *adopted by* United States v. Grigorian, No. 09-22708-CIV, 2010 WL 2884890 (S.D. Fla. July 21, 2010); *Garcia*, 907 N.Y.S.2d 398.

counselor, as opposed to just suggesting it; and whether the advice given by the immigration specialist was correct.

1. A Defense Attorney May Enlist the Assistance of an Immigration Specialist

In *Grigorian v. United States*, the Southern District of Florida held that Mr. Grigorian had not been deprived of effective assistance of counsel where his criminal defense attorney warned him that he would be deported if he accepted a guilty plea, and the immigration specialist whom his defense attorney recommended he consult, in contrast, advised him to take a plea, as going to trial would likely lead to conviction and serious immigration consequences.[188] Mr. Grigorian argued essentially that his defense attorney had made the possibility of deportation upon acceptance of a guilty plea sound *too* definite, and that if he had known he would have been entitled to a deportation proceeding where he could argue the case for letting him remain in the United States, he would have pleaded guilty.[189] The court found that Mr. Grigorian had in fact received enough information regarding the potential immigration consequences of going to trial, and of pleading guilty, and that his defense counsel had thus not been deficient in his performance.[190]

2. A Defense Attorney May Not Abdicate Her Duties to an Immigration Specialist

The New York Supreme Court for the County of Kings has also ruled on a *Padilla* ineffective assistance of counsel claim involving an independent immigration specialist.[191] In *People v. Garcia*, the New York Supreme Court held that the *Padilla* standard is not met, and counsel's performance is

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[188] *See Grigorian*, 2010 WL 2889929, at *3-4, *7. It is noteworthy that Mr. Grigorian did not actually plead guilty, but rather proceeded to trial and was convicted of an aggravated felony, subjecting him to deportation. *See id.* at *1, *4. While the facts of this case are different from those of *Padilla*, in that Mr. Padilla accepted a guilty plea, *see supra* note 4 and accompanying text, the case still deals with the duty of the criminal defense attorney when counseling her client on the choice between a plea and a trial. *Grigorian*, 2010 WL 2889929, at *6.

[189] *See Grigorian*, 2010 WL 2889929, at *3. While Mr. Grigorian contends that he would have pleaded guilty, presumably to a lesser offense, had he known that he would be entitled to an immigration proceeding, this is of no consequence because despite his defense attorney's efforts, the government never offered him a plea bargain to anything less than an aggravated felony. *See id.* at *3-4.

[190] *Id.* at *6-7.

[191] *See Garcia*, 907 N.Y.S.2d at 399.

therefore deficient, where a criminal defense attorney tells her client that she has no knowledge of the immigration law and that he should seek independent advice; the client does seek advice; and he receives incorrect information.[192] Upon being informed by his defense attorney that he would have to inquire elsewhere as to the immigration consequences of taking a guilty plea, Mr. Garcia sought the advice of the only immigration professional whose assistance he could afford: a paralegal.[193] This person incorrectly advised Mr. Garcia that pleading guilty to a single misdemeanor would not result in any negative immigration effects, and Mr. Garcia subsequently accepted a plea of guilty to one misdemeanor count of drug possession.[194]

3. *Grigorian* and *Garcia*: Elucidating the Proper Role of the Immigration Specialist in the Criminal Proceeding

When viewed together, *Grigorian* and *Garcia* present an idea of the different types of scenarios that may arise when a criminal defense attorney recommends her client seek the advice of an experienced immigration attorney. *Grigorian* suggests that it is proper for a defense attorney to direct her client to an immigration expert for additional counseling, where she has already provided him with limited, yet sufficient, advice on the possible deportation consequences of a guilty plea. *Garcia* reinforces the idea that a defense attorney must directly provide some immigration advice in order to meet the *Padilla* standard. Additionally, *Garcia* suggests that where a client is referred to an independent specialist by his defense attorney, the defense attorney must actually facilitate the contact with the specialist, and may be responsible if the specialist provides incorrect advice. However, these two cases are rather fact-specific and their holdings do not necessarily offer much assistance in determining the proper role of the independent immigration specialist in criminal defense cases in general.

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[192] *Id.* at 405. Notably, the New York Supreme Court did ultimately grant Mr. Garcia's motion to vacate his plea on the basis of ineffective assistance of counsel. *Id.* at 407. In addition to counsel's performance being deficient, the court also found that Mr. Garcia had met the burden of proving the prejudice prong of the *Strickland* test. *Id.* at 406-07. The court reasoned that if Mr. Garcia was so worried about the immigration consequences of his plea that he felt the need to ask his defense attorney about them, and seek assistance elsewhere when his attorney could not assist him, he would not have pleaded guilty had he been properly informed that entering a guilty plea would result in deportation. *Id.* at 406.

[193] *Id.* at 400.

[194] *Id.* at 399-400.

For example, *Grigorian* and *Garcia* would not provide much guidance in a situation where a criminal defense attorney failed to personally provide immigration advice, but ensured that her client had unhampered access to a reputable immigration attorney, who ultimately provided correct advice. Nor do these cases evince a standard for a case where defense counsel gave limited but sufficient advice, but also provided her client access to a more experienced immigration attorney, who subsequently gave the client incorrect advice. In the first hypothetical situation, it would be preposterous to deem the criminal defense attorney's conduct ineffective simply because she was not the direct source of the relevant and correct immigration advice. In the second situation, the proper outcome of an ineffective assistance of counsel claim against the defense attorney seems less clear, as the misadvised client should certainly have some recourse after being given incorrect information. However, it would ultimately be ridiculous to hold the defense attorney's performance ineffective, as it would be illogical to require a criminal defense attorney to know that an immigration attorney's advice is incorrect, as a defense attorney would only seek out an immigration attorney precisely because she has limited knowledge of the subject area. It could hardly be argued that defense counsel would fall below professional standards of conduct by providing her client access to an immigration specialist, even where the immigration attorney's advice ends up being incorrect.[195] The proper role of a criminal defense attorney representing a noncitizen should be to facilitate contact between her client and an attorney who is well versed in immigration law.[196] There is no reason that a defense attorney should be required to provide immigration advice first hand, and it would be unfair to hold a defense attorney responsible for the errors of an immigration specialist.[197]

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[195] Although this situation would not meet the first prong of the *Strickland* test, it would certainly seem to prejudice the defendant involved. This calls attention to the idea that the *Strickland* test may fail where behavior that does not qualify as deficient under the first prong of the test creates a situation that would meet the second prejudice prong. *See supra* note 71.

[196] For more ideas on the best practices for representing noncitizens in criminal proceedings, see Maureen A. Sweeney, *Where Do We Go from* Padilla v. Kentucky*? Thoughts on Implementation and Future Directions*, 45 NEW ENG. L. REV. 353, 366-69 (2011) ("The greatest likelihood of successful representation of noncitizen clients is with the collaboration of all those partners currently engaged in the various fields . . . .").

[197] It is true that when a defendant files a claim for ineffective assistance of counsel requesting that his plea or conviction be reversed he is not making a case aimed at holding his attorney responsible. However, if a defendant can make out a claim for ineffective assistance under *Strickland*, *see* discussion *supra* Part I.A, for a violation of his

E. Expanding Padilla

When the *Padilla* Court decided that a criminal defense attorney must advise her noncitizen client of the potential immigration effects of a plea bargain,[198] despite the fact that deportation has traditionally been considered a collateral effect by lower state and federal courts,[199] it opened up the door to ineffective assistance of counsel claims based on a lack of advice or misadvice regarding other consequences that have generally also been considered collateral. For example, several courts have subsequently faced the question of whether to extend the *Padilla* reasoning to the consequence of being required to register as a sex offender.[200] At least two courts have held that ineffective assistance of counsel will be found where plea counsel fails to advise her client that his guilty plea will result in his having to register as a sex offender.[201]

In order to support such a holding regarding sex offender registration, the Georgia Court of Appeals in *Taylor v. State* relied on the factors it believed the Supreme Court used to support its holding regarding deportation.[202] Namely, the

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rights under *Padilla*, *see* discussion *supra* Part II, he will most likely also be able to make out a tort claim for legal malpractice under a theory of negligence. To prove such a malpractice claim, the proponent of the suit has to show that the lawyer in question owed him a duty, "that the lawyer failed to exercise the competence and diligence normally exercised by lawyers in similar circumstances," and that the lawyer's failures caused him actual harm. LERMAN & SCHRAG, *supra* note 18, at 129 (citations omitted). However, it is notable that several jurisdictions require a defendant to additionally prove his innocence in order to prevail on a criminal malpractice claim. *See, e.g.*, Wiley v. Cnty. of San Diego, 19 Cal. 4th 532, 534 (1998); Schreiber v. Rowe, 814 So. 2d 396, 399-400 (Fla. 2002); Rodriguez v. Neilsen, 609 N.W.2d 368, 370 (Neb. 2000); Mahoney v. Shaheen, Cappiello, Steen & Gordon, P.A., 727 A.2d 996, 999-1000 (N.H. 1999). Thus, it is possible that many noncitizen defendants who plead guilty without proper immigration advice from their attorneys will not ultimately be able to hold those attorneys civilly liable. Even so, an attorney may always be held responsible for her actions, through sanctions and other means, under the Model Rules of Professional Conduct propounded in the pertinent jurisdiction. Where a criminal defense attorney does not provide the advice required under *Padilla*, a defendant may report to the relevant bar association that his attorney failed to provide him with competent representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[198] *See* discussion *supra* Part II.

[199] *See supra* note 55 and accompanying text.

[200] *See, e.g.*, Maxwell v. Larkins, No. 4:08 CV 1896 DDN, 2010 WL 2680333, at *1 (E.D. Mo. July 1, 2010); United States v. Rose, No. ACM 36508, 2010 WL 4068976, at *1 (A.F. Ct. Crim. App. June 11, 2010); Taylor v. State, 698 S.E.2d 384, 385 (Ga. Ct. App. 2010); State in Interest of C.P.H., No. FJ-03-1313-02, 2010 WL 2926541, at *1 (N.J. Super. Ct. App. Div. July 23, 2010).

[201] *See Rose*, 2010 WL 4068976, at *4-5; *Taylor*, 698 S.E.2d at 388.

[202] *See Taylor*, 698 S.E.2d at 387-88.

court of appeals endeavored to decide whether professional custom and practice require advisement on sex offender registration, whether this consequence is closely linked to the criminal process, and whether it is comparably as serious as deportation.[203] The court of appeals relied on an ABA publication in deciding that professional standards do require advice regarding sex offender registration.[204] As to the link between conviction and registration, the court of appeals noted that under Georgia law, registration is mandatory for certain offenders, much the same way deportation is.[205] Lastly, the Georgia court found that being forced to register as a sex offender is equally as severe a consequence as being deported in that it is a life-long requirement which restricts a registrant's choices as to residence and profession, and noncompliance with which is a felony.[206]

While none of these conclusions appears to be wholly illogical, it is troubling that the same reasoning can be applied to most other consequences that have traditionally been deemed collateral.[207] For example, a court could easily satisfy these three factors in relation to the loss of voting rights.[208] Holding that criminal defense attorneys are constitutionally bound to advise of any consequences that are pointed out by the ABA, that follow in some sense from conviction, and that can be considered severe, would open up our already overtaxed

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[203] *See id.* at 388-89. Note the *Padilla* holding has also been interpreted as based on two, as opposed to three, factors: close connection to criminal process and severity. *See Sixth Amendment—Effective Assistance of Counsel*, 124 HARV. L. REV. 199, 206-07 (2010).

[204] *Taylor*, 698 S.E.2d at 388 (citing ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, 14-3.2(f), cmt. (3d. ed. 1999)).

[205] *Id.* (citing GA. CODE ANN. § 42-1-12(e)).

[206] *Id.* at 388-89 (citing GA. CODE ANN. §§ 42-1-12(n), 42-1-15).

[207] *See supra* note 55 and accompanying text.

[208] As to the professional norms factor, the ABA publication which the Georgia court cites advises that defense attorneys apprise their clients of all potential collateral consequences before entering a plea of guilty. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY 14-3.2(f) (3d ed. 1999). With regard to the factor of how closely related the loss of voting rights is to criminal conviction, approximately 5.3 million Americans are prevented from voting each year, simply by virtue of the fact that they have been convicted of felonies. *Voting Rights*, SENT'G PROJECT, RES. & ADVOC. FOR REFORM, http://www.sentencingproject.org/template/page.cfm?id=133 (last visited Sept. 23, 2011). Finally, with respect to the severity of being refused the right to vote, it is undeniable that suffrage is a right that both black and female Americans of the past fought a long time to win, and one that we find of the utmost importance as a democratic society. *See* U.S. CONST. amends. XV, XIX; Hon. Anna Blackburne-Rigsby, *Black Women Judges: The Historical Journey of Black Women to the Nation's Highest Courts*, 53 HOW. L.J. 645, 653-56 (2010); S. Brannon Latimer, Comment, *Can Felon Disenfranchisement Survive Under Modern Conceptions of Voting Rights?: Political Philosophy, State Interests, and Scholarly Scorn*, 59 SMU L. REV. 1841, 1841, 1843-44 (2006).

court systems[209] to innumerable new ineffective assistance of counsel claims. One commentator estimates that each state defines as many as several hundred consequences to criminal conviction as collateral.[210] In light of the easily satisfied factors that *Padilla* leaves us with, there is no limit to the types of advice we could potentially require criminal defense attorneys to provide. For example, the Constitution might eventually be interpreted to require that defense attorneys inform clients that if they are convicted of certain crimes they will never be able to adopt a child.[211] This liberal expansion of the type of advice that criminal defense attorneys are required to provide leads us down a path where legal professionals who were trained to navigate the criminal court system and negotiate plea deals for lesser charges and lower sentences are instead acting as therapists and life coaches, discussing with their clients all the social repercussions of committing a crime. While it may be admirable to try to provide a client with all the information that could possibly be relevant to him, it is simply impractical in the real world of limited financial and human resources.[212] It is clear that the Supreme Court has extended claims of ineffective assistance of counsel to encompass failure to provide immigration advice regarding guilty pleas, but lower federal and state courts should not extend that holding any further.

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[209] Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 WILLAMETTE L. REV. 723, 752 (2008) (noting that some federal and state court systems are overburdened).

[210] Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 686 (2011).

[211] *What Are the Requirements to Adopt a Baby*?, LIVESTRONG.COM (MAY 20, 2010), http://www.livestrong.com/article/127624-requirements-adopt-baby/ (noting that under federal law individuals convicted of "felony child abuse or neglect; violent crime; spousal abuse; or a crime against children" may not adopt, and that individual states may have additional restrictions).

[212] *See* Sweeney, *supra* note 196, at 360-64 (discussing the resource challenges that may be encountered when advising noncitizen criminal defendants).

It is noteworthy that the American Bar Association has accepted a contract with the National Institute of Justice to perform a fifty-state survey of the collateral consequences defined under each state's laws. *See* Chin, *supra* note 210, at 685. However, it is unclear when this undertaking will be completed, and whether funding will be provided to keep the surveys current. If such surveys are completed and kept current, it would then be much more reasonable to require criminal defense attorneys to apprise their clients of collateral consequences of conviction. Still, it would always be impractical to require an attorney to provide information on all possible consequences, as they are extremely numerous. *See supra* note 210 and accompanying text.

IV. PREDICTIONS AND RECOMMENDATIONS

*A. What Criminal Defense Attorneys Should Expect in a Post-*Padilla *World*

In the wake of *Padilla*, not much is certain at the intersection of criminal defense and immigration law. However, it is clear that *Padilla* has produced an onslaught of new ineffective assistance of counsel claims. When one of these claims arises on collateral attack, a criminal defense attorney may not be able to predict whether the presiding court will apply *Padilla* retroactively. It does appear that a slight majority of jurisdictions have ruled in favor of applying *Padilla* retroactively.[213] When a court considers a motion to vacate a guilty plea based on ineffective assistance of counsel under *Padilla*, it is unlikely that they will draw a line between clear and unclear immigration laws.[214] Therefore, going forward, it would be provident for defense attorneys to always give the most extensive and accurate immigration advice possible when dealing with noncitizen clients. If there is any chance that the immigration law in question could be considered clear, a defense attorney should research the issue and advise on it.

Criminal defense attorneys with little knowledge of immigration law should still make their best efforts to advise clients on whether accepting a guilty plea would result in deportation. At that point, the attorney may want to enlist an immigration specialist who can advise the client in more detail.[215] However, where a defense attorney suggests such an arrangement, she should take responsibility for facilitating contact between the two parties, and realize that she may be held accountable in a claim for ineffective assistance if the immigration professional provides erroneous advice.[216] Additionally, a defense attorney would be wise to put on the record during her client's plea allocution that she did in fact discuss the particular immigration consequences of the charged offense with her client.[217] However, she should not expect that a claim for ineffective assistance will necessarily be undermined by the presiding judge advising the client of the possible consequences of his plea during his

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[213] *See* discussion *supra* Part III.A.
[214] *See* discussion *supra* Part III.B.
[215] *See* discussion *supra* Part III.D.
[216] *See* discussion *supra* Part III.D.
[217] *See* discussion *supra* Part III.C.1.

allocution.[218] Finally, a criminal defense attorney should be prepared for the fact that after *Padilla*, ineffective assistance of counsel claims may arise where she failed to provide advice on any number of collateral consequences.[219]

*B. Recommendation: An Ideal Post-*Padilla *World*

Although the previous section contains a summary of what practitioners should expect in light of the way lower courts have interpreted the Supreme Court's *Padilla* decision, it is certainly not a summary of what would be best for our criminal justice system. For example, *Padilla* should not be applied retroactively because doing so would disturb the finality of many pleas. This, in turn, would produce a massive caseload in the form of ineffective assistance of counsel claims, which would result in new trials that our overburdened system is not equipped to handle. Additionally, when dealing with *Padilla*-based ineffective assistance of counsel claims, courts should make a practice of distinguishing between clear and unclear immigration law, as this may prove a useful method for weeding out meritless claims. Furthermore, ineffective assistance claims should be immediately dismissed based on the prejudice prong of the *Strickland* test where the record of the plea colloquy indicates either that the presiding judge asked the defendant whether his counsel had advised him of the immigration consequences of his plea, and the defendant answered in the affirmative, or that the judge herself informed the defendant of the consequences. As a counter to the argument that some defendants will not necessarily take the judge's advice over that already provided by their attorney, plea colloquies should be lengthened so that the judge may explain in depth the possible immigration consequences of a guilty plea and also obtain a more detailed account of the advice that was given by the defense attorney. This will certainly take up less time and resources than conducting numerous new trials resulting from ineffective assistance of counsel claims. Additionally, when an ineffective assistance of counsel claim is based on a defense attorney's failure to personally advise of the immigration consequences of accepting a plea, it should be discounted if defense counsel did in fact facilitate her client's access to a competent immigration attorney, even where that immigration

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[218] *See* discussion *supra* Part III.C.2.

[219] *See* discussion *supra* Part III.E.

attorney actually provided erroneous advice. Finally, the *Padilla* holding should not be extended beyond immigration consequences to other effects of conviction that have previously been deemed collateral. Such an extension leads us down a road where we can no longer recognize the role of the criminal defense attorney.

CONCLUSION

While the Supreme Court's holding in *Padilla v. Kentucky* was certainly a victory for noncitizen criminal defendants, and was perhaps appropriate in light of the current state of immigration law, its effects will only remain positive if it is construed narrowly by the lower courts. Such a course of action will respect the fact that immigration matters are serious, and that deportation is a harsh consequence, without overburdening court systems and criminal defense attorneys.

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